CHAPTER 19

MORAL PHILOSOPHY AND INTERNATIONAL LAW

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What we miss is what might have been done.[1]

1 INTRODUCTION

THE moral philosophy of international law is a kind of philosophical or theoretical[2] enquiry pertaining to international law. It is normative[3] and consists, more

[1] J Waldron, 'International Law: "A Relatively Small and Unimportant Part" of Jurisprudence?' in LD d'Almeida, J Edwards, and A Dolcetti (ed), *Reading HLA Hart's 'The Concept of Law'* (Hart Oxford 2013) 209–23.

[2] I am using the terms philosophical and theoretical interchangeably in this chapter.

[3] The adjective 'normative' is used to refer to what is based on (moral) values (for example equality, justice, fairness).

specifically, in the 'reasoned moral evaluation of existing international law'[4] that should 'guide the design and reform of international law'.[5] To quote Allen Buchanan, the concern of the moral philosophy of international law 'is with what the law should be',[6] rather than with what it is.

The moral philosophy of international law amounts to more than merely another theoretical approach to international law. It happens to be one of the most established forms of international legal theory to date.[7] It has flourished from the 1970s onwards, and even more since 2000, in reaction to the long absence of international legal philosophy or, at least, to the absence of alternative forms of normative philosophy of international law within international legal theory. Of course, things have started to change: moral philosophy is no longer the only alternative to 'realist' or, more generally, non-normative theorizing about international law. Normative philosophical accounts of international law are gradually emerging from within international legal scholarship, just as they did in domestic law in centuries past.[8]

Accordingly, a chapter on the moral philosophy of international law cannot merely amount to an exposition and discussion, albeit critical, of the main features of this specific approach to international legal theory and its contributions. It also has to pertain to the nature of the philosophy of international law in general and to what its method should be.[9] Hence the apparently equivocal title of the present chapter— 'Moral Philosophy *and* International Law'—signals that a meta-theoretical discussion in international legal theory is very much needed. The time has come indeed to escape the Manichean opposition between 'realism' and 'moralism' that is said to have long plagued international legal theory. In that opposition, moralism has been qualified as the posture of both normative international legal theorists and international moral philosophers alike who endorse normative positions about the law as either already being the law or as having to become the law at any price,[10] thus leaving no place for normative theories of international law that do not conflate law and morality.

The structure of the chapter is two-pronged and reflects these two angles on the topic. First, it offers a critical discussion of the origins, aims, and main contributions of moral philosophies of international law. Secondly, it moves up a level to a

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[4] See A Buchanan, 'International Law, Philosophy of' in E Craig (ed), *Routledge Encyclopedia of Philosophy* (Routledge London 2006) <https://www.rep.routledge.com/articles/international-law-philosophy-of/v-1/> [accessed 24 February 2016]. See also A Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (OUP Oxford 2004) at 15.

[5] See *Justice, Legitimacy and Self-Determination* (n 4) 2.   [6] See ibid 4.

[7] See S Besson and J Tasioulas, 'Introduction' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (OUP Oxford 2010) 1–27; A Orford, 'In Praise of Description' (2012) 25 *Leiden Journal of International Law* 609–25.

[8] See also 'International Law: "A Relatively Small and Unimportant Part" of Jurisprudence?' (n 1) 222–3.

[9] For an early and brief treatment of the question, see *Justice, Legitimacy and Self-Determination* (n 4) chs 10 and 11.

[10] See eg A Orford, 'Moral Internationalism and the Responsibility to Protect' (2013) 24 *European Journal of International Law* 83–108. See also, albeit in other words, R Kolb, 'Deux arguments nocifs pour le droit international public' (2013) 23 *Revue suisse de droit international et européen* 337–50.

meta-theoretical discussion of international law, and in particular to how international legal theory should best be conceived and conducted. It argues for the development of normative legal philosophies of international law that take the normativity of law and hence its legality more seriously than international legal theorists have so far, but also—and this is key to their future positioning in international legal theoretical debates—than moral philosophers of international law have themselves.

2 MORAL PHILOSOPHY OF INTERNATIONAL LAW

2.1 The Origins

While classical legal philosophers from Hugo Grotius to Hans Kelsen have certainly grappled with normative questions about international law,[11] it is also the case that, until comparatively recently, the post-1960 revival of legal philosophy in Anglo-American scholarship has tended to neglect international law.

This 'poor relation' status is attributable to a variety of causes. In part, it may reflect a commendable intellectual prudence on the part of philosophers of law. For one might reasonably suppose that many of the questions of legal philosophy are best approached in the first instance via their application to municipal state legal systems, which are both more familiar and more highly developed, before advancing to their international counterparts. Of course, one should guard against this prudential policy hardening into the dogma that the philosophical study of international law can shed no independent light on philosophical questions either about law in general or its domestic instantiations. Legal theorists inspired by the jurisprudential work of Herbert Hart, for instance, have now come to realize the cost of such missed opportunities.[12]

However, there are probably less obviously benign causes for the long absence of philosophical treatment of international law. These include the relative insularity of international law as a field within legal studies, widespread scepticism about whether international law is really law, as well the nagging suspicion, shared by

[11] See eg H Grotius, *De Jure Belli et Pacis Libri Tres* (FW Kelsey trans) (Clarendon Press Oxford 1925 [1625]); H Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems, with Supplement* (F Praeger New York 1950).

[12] For just such a critique of the mainstream reading of HLA Hart, *The Concept of Law* (J Raz and PA Bulloch eds) (3rd edn OUP Oxford 2012) ch X, see 'International Law: "A Relatively Small and Unimportant Part" of Jurisprudence?' (n 1).

both international lawyers and domestic lawyers, that, with its cumbersome and obscure methods of norm-creation and its frail enforcement mechanisms, international law does not yet constitute a worthwhile subject for normative inquiry and should first establish itself as a legal practice and perhaps as a doctrinal subject before being further theorized.[13] This also explains why outsider-theoretical approaches have been so successful in international law:[14] approaches external to the law appeared more 'scientific' and hence more authoritative. And this in turn may account for why interdisciplinarity has had so much more traction among international legal scholars than in domestic law.[15] Another likely cause for the philosophical neglect of international law is the corrosive influence of the general realist thesis that political morality does not reach beyond the boundaries of the state, or that only a very minimalist morality does, or, more charitably still, that although a richer political morality might eventually come to apply globally, to elaborate on it in the current state of the world is to engage in a utopian endeavour.[16]

As a result, to the extent that international law has been the object of theoretical attention in recent decades, much of it has come from writers drawing on either international relations theory or various approaches inspired by postmodernism.[17] Whatever one's view of the respective merits of these two schools of thought, their prevalence has had the consequence of sidelining the discussion of philosophical questions, particularly those of a normative character. Adherents of both schools tend to be sceptical about the coherence, tractability, interest, or utility of the conceptual questions addressed by philosophers. More importantly, the purportedly scientific, 'value-neutral' method favoured by the great majority of international relations theorists, especially adherents to the dominant 'realist' tradition, and the scepticism about reason endorsed by postmodernists, seem to allow little scope for an intellectually respectable form of normative inquiry. So, from the perspective of

[13] On international law scholars' inferiority complex, see J Klabbers, 'The Relative Autonomy of International Law or the Forgotten Politics of Interdisciplinarity' (2004) 1 *Journal of International Law and International Relations* 35–48, at 41.

[14] See eg in the field of economics, politics, or international relations: A-M Slaughter, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *American Journal of International Law* 205–39; A Dunoff and M Pollack, *Interdisciplinary Perspectives on International Law and International Relations* (CUP Cambridge 2012); E Posner and A Sykes, *Economic Foundations of International Law* (Harvard University Press Cambridge MA 2013); A van Aaken, 'Behavioral International Law and Economics' (2014) 55 *Harvard International Law Journal* 421–81.

[15] See 'The Relative Autonomy of International Law or the Forgotten Politics of Interdisciplinarity' (n 13).

[16] For a presentation and discussion of those critiques, see Section 2.3 below.

[17] See eg K Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers' (1989) 14 *Yale Journal of International Law* 335–411; WM Reisman, 'The View from the New Haven School of International Law' (1992) 86 *American Society of International Law Proceedings* 118–25; M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (revised edn CUP Cambridge 2005).

contemporary legal philosophy, the similarities between these two camps are perhaps at least as important as their differences.

The long marginalization of normative philosophical inquiry into international law is especially regrettable, since the most pressing questions that arise concerning international law today are arguably primarily normative in character. Of course, this is not to say that past[18] and present[19] international relations theorists and international lawyers have not considered normative questions raised by international law. The point is merely that they have not done so philosophically. This explains how the moral philosophy of international law developed in reaction to this dearth of normative accounts of international law *within* international legal theory. First accounts appeared in the 1970s, but most contributions were published post-2000.

Early landmark works on international themes in normative political and/ or moral philosophy were Michael Walzer's *Just and Unjust Wars*,[20] Charles Beitz's *Political Theory and International Relations*,[21] and Henry Shue's *Basic Rights: Subsistence, Affluence, and US Foreign Policy*.[22] Those were then joined by the influential writings of other philosophers and lawyers.[23] Special mention should

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[18] See eg the early and mid-twentieth-century international lawyers whose focus was the moral foundations of international law: A Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer Berlin 1926); JL Brierly, *Law of Nations* (Clarendon Press Oxford 1928); H Lauterpacht, *The Function of Law in the International Community* (Clarendon Press Oxford 1933).

[19] See eg RA Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective* (Transnational Publishers Ardsley 1998); P Allott, *Eunomia: New Order for a New World* (Clarendon Press Oxford 1990). One may also think of critical writings on international law published by feminist or 'third world approaches to international law' scholars: see eg H Charlesworth and C Chinkin, *The Boundaries of International Law* (Manchester University Press Manchester 2000); A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP Cambridge 2007).

[20] M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th revised edn Basic Books New York 2006).

[21] C Beitz, *Political Theory and International Relations* (Princeton University Press Princeton 1979).

[22] H Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (2nd edn Princeton University Press Princeton 1996).

[23] See eg J Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (University of California Press Berkeley 1987); TM Franck, *Fairness in International Law and Institutions* (OUP New York 1995); G Teubner, *Global Law without a State* (Dartmouth Aldershot 1997); W Twining, *Globalisation and Legal Theory* (Northwestern University Press Evanston 2000); O O'Neill, *Bounds of Justice* (CUP Cambridge 2000); TW Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity Press Cambridge 2002); F Tesón, *A Philosophy of International Law* (Westview Press Boulder 1998); MC Nussbaum, *Women and Human Development: The Capabilities Approach* (CUP Cambridge 2000); *Justice, Legitimacy and Self-Determination* (n 4); L May, *Crimes Against Humanity: A Normative Account* (CUP New York 2004); MNS Sellers, *Republican Principles in International Law: The Fundamental Requirements of a Just World Order* (Palgrave Macmillan New York 2006); L May, *War Crimes and Just War* (CUP Cambridge 2007); L May, *Aggression and Crimes Against Peace* (CUP New York 2008); J Griffin, *On Human Rights* (OUP Oxford 2008); W Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (CUP Cambridge 2009); CR Beitz, *The Idea of Human Rights* (OUP Oxford 2009); A Altman and CH Wellman, *A Liberal Theory of International Justice* (OUP Oxford 2011); J McMahan, *Killing in War* (Clarendon Press Oxford 2011); C Fabre, *Cosmopolitan War* (OUP Oxford

be made of two seminal monographs. First of all, and especially important, given his dominant influence on Anglo-American political philosophy, has been the publication in 1999 of John Rawls' final work, *The Law of Peoples*, which has already sparked a voluminous secondary literature.[24] Secondly, Allen Buchanan's *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, which appeared in 2004, is arguably the most systematic and comprehensive discussion of the morality of international law by a contemporary moral philosopher.[25] Unlike its predecessors, Buchanan's theory is not only holistic in coverage, thus providing a rare systematization of the moral regime of international law, but also, unlike John Rawls' theory, it focuses on the institutional and legal dimensions of international law, thereby addressing many of the difficulties facing non-ideal moral theories of international law.

Most work on the moral philosophy of international law appeared after 2000. Since 2006—eight years after the publication of its first, print edition—the on-line version *Routledge Encyclopedia of Philosophy* has included a lengthy entry on 'International law, Philosophy of'.[26] Since then, various collected volumes have been published with a main or partial emphasis on the moral philosophy of international law. The co-edited volume *The Philosophy of International Law* published in 2010 largely comprised authors who were moral philosophers of international law.[27] A similar project was published in 2012 under the title *Philosophical Foundations of European Law*.[28] Finally, there has been a multitude of recent philosophy journals or special issues entirely or partially devoted to the discussion of topics in the moral philosophy of international law.[29]

Regrettably, one of the side effects of the boom in the moral philosophy of international law has been the reinforcement and entrenchment, somehow, of 'realist' and postmodern approaches to international legal theory within international legal

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2012); E Jouannet, *What is a Fair International Society? International Law between Development and Recognition* (Hart Oxford 2013).

[24] J Rawls, *The Law of Peoples with 'The Idea of Public Reason Revisited'* (Harvard University Press Cambridge MA 1999). See eg R Martin and DA Reidy (eds), *Rawls' Law of Peoples: A Realistic Utopia?* (Blackwell Oxford 2006); J Tasioulas, 'From Utopia to Kazanistan: John Rawls and the Law of Peoples' (2002) 22 *Oxford Journal of Legal Studies* 367–96; A Buchanan, 'Rawls' Law of Peoples: Rules for a Vanished Westphalian World' (2000) 110 *Ethics* 697–721; C Beitz, 'Rawls' Law of Peoples' (2000) 110 *Ethics* 669–96; G Brock, 'Recent Work on Rawls' Law of Peoples: Critics versus Defenders' (2010) 47 *American Philosophical Quarterly* 85–101.

[25] *Justice, Legitimacy and Self-Determination* (n 4).

[26] 'International Law, Philosophy of' (n 4).

[27] See generally *The Philosophy of International Law* (n 7).

[28] J Dickson and P Eleftheriadis, *Philosophical Foundations of European Union Law* (OUP Oxford 2012).

[29] See eg *Transnational Legal Theory; Ethics and International Affairs*; and special issues in (2005) 18(4) *Leiden Journal of International Law* (on cosmopolitanism, global justice, and international law); (2002) 13(4) *European Journal of International Law* (on Tom Franck); (2013) 24(1) *European Journal of International Law* (on Michael Walzer).

scholarship itself, at the price of normative legal philosophies of international law. A common view is indeed that if normative approaches can strive outside international law scholarship and theory, then there is no clear need to develop normative approaches to international law from within. As a result, many international lawyers interested in normative theorizing have merely endorsed or joined the moral philosophy of the international law project.[30]

All this has contributed to further entrenchment—rather than alleviation— of the artificial opposition between 'realist' approaches of international law and so-called 'moralist' ones, alluded to in the introduction.[31] True, many international legal scholars pigeonholed into the latter group have gradually distanced themselves from that label,[32] rightly claiming that endorsing a particular moral philosophy of international law does not imply that they negate the distinction between law and morality, the importance of the rule of law, and the existence of content-independent grounds of the legitimacy of international law. This echoes the legal positivist defence articulated by some advanced moral philosophers of international law, such as Buchanan, for fear of being accused of being natural lawyers.[33] However, the need to make such basic distinctions between a normative argument about what the law should be and an argument about what it is, and the corresponding conflation between one's moral philosophy of law and a theory of legal validity show how limited the predominant understanding of the normativity and legality of international law still is both in moral philosophy of international law and in international legal theory.

2.2 The Aim, Scope, and Standards

The main aim of moral philosophers of international law is to contribute to the formulation of moral standards for the evaluation of public international law, both in general and with respect to its main parts. Such standards, they claim, should play a vital role in determining the basis and proper extent of our allegiance to international law and institutions and in guiding their reform.

In short, moral standards are concerned with what human beings, as individuals or groups, owe to other human beings, and perhaps also other beings, in light of the status and interests of the latter, where the breach of the relevant standards typically validates certain characteristic responses: blame, guilt, resentment,

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[30] See eg SR Ratner, 'Ethics and International Law: Integrating the Global Justice Project(s)' (2013) 5 *International Theory* 1–34; *A Philosophy of International Law* (n 23).

[31] See eg 'Moral Internationalism and the Responsibility to Protect' (n 10).

[32] See eg A Cassese, 'Introduction' in A Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP Oxford 2012) xvii–xxii.

[33] See the critique by Buchanan in *Justice, Legitimacy and Self-Determination* (n 4) 20–1.

punishment, and so on. More concretely, moral standards refer to a rich and diverse repertoire of concepts through which the notion of moral concern has historically been elaborated: obligation, justice, rights, equality, among many others. Morality, therefore, consists of a set of standards which, among other things, places restrictions on our—often self-interested—conduct in order to pay proper tribute to the standing and interests of others.

There are as many kinds of moral philosophy of international law as there are conceptions of morality. They share common traits, however, especially with respect to scope and standards, and this explains how they may be said to belong to the same philosophical tradition.

With respect to scope, unlike other forms of moral (or political) philosophy, the moral philosophy of international law does not (only) pertain to a given domestic community, but takes the discussion further to encompass conduct beyond the state. It may either be about conduct within all political communities and the corresponding transnational moral standards, on the one hand, or about relations among agents that are not members of the same political community and the relevant international moral standards, on the other.[34] Some moral standards, of course, might be of both sorts. For example, human rights norms are typically conceived as applying within all political communities, but their (threatened) breach is also often taken to justify (at least *pro tanto*) some form of preventive or remedial response by other political communities or international agents. The task of a moral philosophy of international law is to elaborate the content and draw out the practical implications of such moral principles for international law.

Importantly, however, the moral philosophy of international law does not approach international relations generally as other forms of moral philosophy of international justice or political morality do. Instead, it focuses on international law and international legal institutions specifically.[35] The breadth of the field becomes clear when one looks at the diversity of areas of international law addressed, and of the general or specific moral questions that arise in those contexts.[36] The fields in international law most routinely addressed by moral philosophers of international law are the laws of war, international humanitarian law, international human rights law, international law on self-determination, international economic law, international criminal law, and international environmental law. In response to the fragmentation of the philosophical treatment of the general transitive moral questions arising across these different fields of international law, a scant few moral philosophers of international law have provided an 'integrated' moral theory of international law.[37] One may distinguish therefore between general and specific moral philosophies of international law.

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[34] See *Justice, Legitimacy and Self-Determination* (n 4) 17ff.
[35] On this distinction, see ibid 190–1.
[36] See 'International Law, Philosophy of' (n 4) section 1.
[37] See eg *Justice, Legitimacy and Self-Determination* (n 4) 4, 59.

In terms of applicable standards, unlike forms of non-moral normative philosophy of international law, moral philosophies of international law operate by reference to morality only, and hence to normative standards external to the law—even if they are reconstructed by some moral philosophers from the international legal practice itself or even if those moral philosophers take international law as a key element in their social or political epistemology.[38] This is an important distinction as it signals, as I will explain later in this chapter, the fundamental difference between the most law-sensitive moral philosophies of international law and the most morality-related legal theories of international law and in turn how normative legal philosophies of international law may be differentiated from moral philosophies of international law.

For the rest, one may observe the same diversity of substantive and methodological approaches as in domestic moral philosophy.

The substantive debates familiar to moral and political philosophers writing about domestic communities are brought one layer up the ladder into the international sphere. One may mention, for instance, debates between consequentialist and non-consequentialist approaches to morality or between liberal and non-liberal ones. It would be a grave error, however, to assume that a commitment to a normative theory of international law necessarily carries with it some specific ethical-political commitment, such as a liberal cosmopolitanism that insists on the appropriateness of implementing an essentially liberal-democratic political vision through the medium of international law. On the contrary, the appropriateness of doing so is a central question for debate once we have accepted that normative international legal theory is a viable and worthwhile enterprise. Moral or political philosophy does not amount to the more fundamental discipline and it is a mistake, as a result, to think that the moral philosophy of international law cannot inform general moral or political philosophy in return. In fact, as the moral philosophy of international law ripens, the distinction between it and moral and political philosophy *tout court* becomes less clear.[39]

Another set of debates familiar to moral and political philosophers exported into the moral philosophy of international law pertains to method. One of those debates relates to the opposition between ideal and non-ideal moral theorizing. To paraphrase Buchanan, whereas the task of ideal theory is to set the most important moral targets for a better future in international law, non-ideal theory's task is to guide our efforts to approach those ultimate targets, both by setting intermediate moral targets and by helping us to determine which means and processes for achieving them are morally permissible.[40] The latter depends on the former, however, and the former depends on the latter to assess its feasibility and accessibility—both

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[38] See generally *Justice, Legitimacy and Self-Determination* (n 4).
[39] See 'International Law, Philosophy of' (n 4) section 5.
[40] *Justice, Legitimacy and Self-Determination* (n 4) 60–1.

of them being conditions of any moral theory. This explains why they cannot be contrasted as a choice. The best moral philosophies of international law should therefore aim at providing both ideal and non-ideal elements.

2.3 The Critiques

Moral philosophy of international law has provoked considerable scepticism as an enterprise. Sometimes this takes the form of denying the very possibility of a normative theory of international law: doubt is cast on the existence of justifiable transnational and international moral standards that might appropriately be reflected in international law. More often, however, it is scepticism about the scope and content of the relevant moral standards: even if it is conceded that some moral standards obtain in the case of international law, they are thought to be severely limited in their coverage and very minimal in their demands. These two brands of scepticism may be referred to, respectively, as radical and moderate.[41]

2.3.1 Radical Scepticism

A primary basis for radical scepticism about the project of a moral philosophy of international law consists in scepticism about the objectivity of morality itself. The argument here is that morality (pejoratively described as 'utopianism' or, in international law debates, as 'moralism') presents itself as a set of constraints, discoverable by reason, on the pursuit of self-interest by individuals and states. By contrast, the realist critique of morality reveals all moral principles to be themselves products of circumstances and interests and weapons framed for the furtherance of interests.[42]

Yet even if correct, the corrosive implications of scepticism about moral objectivity extend not just to the normative theory of international law, but to any form of thought involving moral judgement. This is not necessarily an argument against it, but it does show that it is not a problem uniquely afflicting normative theorizing about international matters. Moreover, it places its advocates under special pressure to avoid self-refutation, since they typically do wish to assert the appropriateness of moral judgements in some non-international contexts. In addition, it is far from obvious that either the Marxist or any other brand of realist critique has securely established the advertised conclusion that morality is merely the product of, and perhaps also ideological window-dressing for, underlying interests (or preferences, desires, and so on). Moral scepticism of this sort is highly controversial in

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[41] See also *Justice, Legitimacy and Self-Determination* (n 4) 29ff.

[42] See eg EH Carr, *The Twenty Years' Crisis 1919–1939: An Introduction to the Study of International Relations* (Palgrave Macmillan 2001 [1939]) at 65.

philosophical circles today. How easy is it to dispute, after all, that the proposition 'slavery is unjust' is plainly true, even as '2+1=3' is plainly true? And why must the best explanation of anyone's belief in the former proposition, unlike their belief in the latter, necessarily exclude appealing to the fact that the proposition in question is true?[43]

Perhaps a more constructive observation is that there are many ways in which morality can be admitted to be 'subjective' without thereby failing to be 'objective' in some significant sense that allows for moral propositions to be straightforwardly true or justified, for belief in true moral propositions to take the form of knowledge, and for changes in moral belief over time to represent genuine cognitive progress or regress. In particular, the objectivist need not embrace the metaphysical claim that moral values, such as justice, are radically mind-independent, like the famed Platonic forms, existing in splendid isolation from human modes of consciousness and concern.

So, a nuanced appreciation of the kind of 'objectivity' requisite to the meaningful pursuit of a normative approach to international law may serve to quell sceptical concerns of the first sort about the prospects for developing a normative theory of international law. And this is just as well, since many of those who press such concerns seem themselves to subscribe to numerous moral propositions.[44]

2.3.2 Moderate Scepticism

Other more moderate forms of scepticism about the enterprise of a normative theory of international law concentrate not so much on the nature of morality, but on the putative subject matter—in particular, relations among states—about which such theories seek to make moral judgements. Even if moral reasoning is in principle capable of attaining a respectable degree of objectivity, the argument goes, its remit either does not extend to the case of international law, or else does so only in a highly attenuated form.

One line of argument of this kind turns on regarding the sphere of international law's application, at least in the present and the foreseeable future, as a state of nature.[45] This is because it is a domain in which the key agents—territorial states—exhibit three important features: (i) they are ultimately motivated by the fundamental aim of ensuring their own survival; (ii) they are approximately equal in power, in the sense that no one state (or stable grouping of states) can permanently dominate all the others; and (iii) they are not subject to a sovereign capable of securing peaceful cooperation among states by authoritatively arbitrating conflicts

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[43] See T Nagel, *The Last Word* (OUP Oxford 1997) ch 6.

[44] See *The Twenty Years' Crisis 1919–1939* (n 42).

[45] See eg K Waltz, *Man, the State, and War: A Theoretical Analysis* (Columbia University Press New York 1959).

among them. In such circumstances, it is contended, it would be deeply irrational for a state to conform its conduct to moral demands; hence, morality is inapplicable to the sphere that international law purports to govern.[46]

There is good cause to resist this sort of sceptical argument, even in its most moderate form.[47] If the international sphere were a state of nature, it is very doubtful that it could sustain any institution meriting the name of 'law'. Yet, it makes good sense to speak of international law governing the relations between sovereign states through norms and institutions enabling cooperation, even in the absence of a global sovereign. More generally, the ultimate or predominant determinant of a state's behaviour cannot be the desire to ensure its survival (or, in another version, to maximize its power). Anyway, it is obviously not the case that compliance with moral standards inevitably imperils a state's chances of survival. Finally, liberal approaches to international relations may emphasize the responsiveness of a state's preferences to the internal character of the state (for example, whether its constitution is democratic) and its society (for example, the extent to which it is pluralistic and accommodating of internal differences).

In response, an advocate of the state of nature analogy might be tempted to stretch the notion of state preference for survival, or power, so that it encompasses all of the seemingly countervailing evidence for the irreducible diversity of states' interests. Doing so, however, would lead to the trivialization of the state of nature argument, rendering it unfalsifiable by any empirical evidence.

Nothing in the foregoing observations is inconsistent with acknowledging a core of authentic insight in the state of nature argument. One way of spelling it out is in terms of feasibility constraints on an acceptable normative theory of international law. These are different from, and in all probability far more limiting than, those that apply in the domestic case.[48] What we may rightly take issue with, however, is the sweepingly negative conclusion that sceptics who appeal to the state of nature analogy seek to draw from this insight.

There are more plausible ways of motivating moderate scepticism about the prospects of a normative theory of international law than simply invoking a state of nature analogy. Another line of thought appeals to the ethical-political significance of an important feature of the international domain: the great diversity that exists in ethical and political concepts among different cultures, and also the considerable divergence in judgements among those who deploy the same concepts.

One way of elaborating this general line of thought is by means of the notion of ethical pluralism. The latter doctrine is wholly compatible with the objectivity of

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[46] See the general outline of the 'state of nature' argument in *Justice, Legitimacy and Self-Determination* (n 4) 29–30.

[47] For those critiques, see ibid 31–7; *Political Theory and International Relations* (n 21) 185–91.

[48] See *Political Theory and International Relations* (n 21) 187.

ethics, and so is not to be confused with ethical relativism and hence with radical scepticism about value. But, given the profusion of objective ethical values and the diverse number of ways in which their content may be acceptably elaborated and relations between them ordered, proponents of this view are doubtful that a 'global ethic' applicable to all states and suitable for embodiment in international law and institutions will be anything other than minimalist in content.[49] Instead, it will predominantly consist of a limited set of universal norms.

A second line of thought purports to stand aloof from all philosophical controversies, such as those concerning ethical objectivism, and focuses instead on the conditions of a legitimate international law; one that can credibly claim to be binding on all its subjects. John Rawls, for instance, has argued that it is necessary for the principles underlying law, at both the domestic and the international levels, to be justifiable to all of those subject to them. In both cases, the operative form of justification must be in terms of a form of public reason—rather than ordinary, truth-oriented moral reasoning—that is responsive to the fact of reasonable pluralism. In the case of a liberal society, this is a pluralism about conceptions of the good held by individual citizens, who are nonetheless reasonable in that they accept the criterion of reciprocity (they are prepared to cooperate with others on fair terms as free and equal citizens) and the burdens of judgement. In the Rawlsian conception of the international case, however, the justification is directed at political communities, rather than the individuals who compose them, and reasonable pluralism extends to conceptions of justice, not simply conceptions of the good.[50] This means that, for Rawls, decent but non-liberal societies may be counted as members in good standing of the Society of Peoples; they have good standing even in terms of an ideal theory of international justice. This is despite the fact that such societies are not democratic and may engage in various illiberal practices. Rawls' approach also leads to a notoriously truncated list of human rights, certainly as compared with the *Universal Declaration of Human Rights*,[51] and to the inapplicability of principles of distributive justice (including Rawls' famous 'difference principle') to the global sphere: neither the difference principle nor any other principle of distributive justice bears on relations *between* societies, nor is respect for it mandated *within* each society in order to ensure its good standing under the Rawlsian Law of Peoples.

Of course, there is a great deal that needs to be said in assessing the pros and cons of moderate scepticism of the last two varieties. The key point is that moderate scepticism is not really all that sceptical. On the contrary, it presents itself as

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[49] See eg M Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Blackwell Oxford 1993) at 28–30.

[50] *The Law of Peoples with 'The Idea of Public Reason Revisited'* (n 24) 11, 19 (the international case) and 136–7 (the domestic case).

[51] 'Universal Declaration of Human Rights' GA Res 217A(III) (10 December 1948) UN Doc A/810.

a self-consciously moral and critical position *within* the enterprise of articulating a normative theory of international law.

2.4 The Contributions

From the perspective of international law and its scholarship and hence from a meta-theoretical perspective, one may identify three major contributions of general moral philosophies of international law—leaving aside important field-specific contributions as in the laws of war or human rights law context.

2.4.1 *Thinking Normatively about International Law*

The first and main contribution of moral philosophies of international law has been to show that one may think normatively about international law. From the perspective of moral philosophy, this is not particularly worth emphasizing because any social practice may be assessed normatively. For international lawyers, however, who for a long time had difficulty understanding the normativity of international law and how it may or may not differ from that of domestic law, it has been a key contribution to further development inside international legal theory, especially as an argument to eschew the anti-normative stance of 'realists' and postmodern theorists of international law alike.

The criticism one may make, however, is that most moral philosophers of international law to date have contented themselves with a social science understanding of their object. This is surprising, and not only to a lawyer, given that their object is legal and hence, prima facie at least, normative. All the same, most moral philosophers of international law to date have addressed their material (international law and international legal institutions) as morally inert and seen the only normative element in the picture as stemming from the moral standards applied to that institution.[52] This, however, corresponds to an impoverished account of law but also of legal philosophy. One may argue indeed that there is no 'legal normativity' as such, that is, distinct from (moral) normativity, but rather a special (moral) normativity of law due to a special socio-political context that contributes to specifying or even generating norms anew.[53] What this means, in other words, is that the normativity of law is neither pure and distinct from morality, nor merely moral. Of course, this critique affects institutional or non-ideal moral theories of international law less than ideal ones, for their focus is on existing

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[52] See eg *Political Theory and International Relations* (n 21).

[53] See J Raz, 'The Normativity of Law' (2013, unpublished manuscript on file with author) on the law's 'double moral life'.

institutions and their internal potential for progress and reform.[54] However, the critique still bites because, even in non-ideal moral philosophies of international law, the relevant reasons and their generation are not necessarily attributed to the legal context and its institutions.

2.4.2 Conceptualizing the Legitimacy of International Law

A second and more specific contribution of moral theorizing of international law has been to bring to the fore justifications of the legitimate authority or legitimacy of international law that are not strictly legal. Again, from a moral perspective, this has meant revisiting well-trodden paths for domestic legal philosophers.[55] For international lawyers, however, emphasizing how the authority of international law needs a moral justification to bind and not only to coerce, on the one hand, and how consent does not suffice morally to create an obligation, on the other, has been particularly fruitful to discussions pertaining to how best to make international law in particular, but also to how best to organize the relations between domestic and international law.[56]

However, a critical remark is in order. Moral philosophers of international law have focused mostly on content-dependent reasons for the authority of international law, such as global justice or human rights.[57] They have only rarely realized how advanced legal philosophers are in their understanding of the legitimacy of law and in particular of content-independent reasons the law gives for its authority. This neglect partakes of the same lack of understanding of the specific (moral) normativity of international law alluded to before.

2.4.3 Isolating the Legality of International Law

A third contribution of the moral philosophy of international law to the theory of international law derives from the other two: it has contributed to isolating and understanding the legality of international law itself. This has, of course, not been intended by most moral philosophers of international law given their often limited understanding of law's social and normative specificities.[58] However, their external take on international practice has indirectly helped international lawyers to

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[54] See *Justice, Legitimacy and Self-Determination* (n 4) 53ff and especially at 57–9 (on the 'Vanishing Subject Matter Problem' in ideal theories).

[55] See eg J Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1003–44.

[56] See eg A Buchanan, 'The Legitimacy of International Law' in *The Philosophy of International Law* (n 7) 79–96; J Tasioulas, 'The Legitimacy of International Law' in *The Philosophy of International Law* (n 7) 97–118; S Besson, 'The Authority of International Law: Lifting the State Veil' (2009) 31 *Sydney Law Review* 343–80.

[57] See eg R Goodin, 'Enfranchising All Affected Interests, and Its Alternatives' (2007) 35 *Philosophy and Public Affairs* 40–68.

[58] See eg *Political Theory and International Relations* (n 21).

consolidate their own internal understanding of that social and normative practice's specificity, that is, its legality.[59] It has also contributed to developing international lawyers' sense of their own discipline. It is to this vindication process I would like to turn now.

3 TOWARDS A LEGAL PHILOSOPHY OF INTERNATIONAL LAW

3.1 The Meta-Theoretical Turn

Even though the long absence of normative legal philosophy of international law has been compensated for by resorting to moral philosophizing about international law, there is no reason why this may not change. This raises the more general meta-theoretical question of how best to conduct normative theorizing about international law, and whether and how this may be done within the boundaries of legal philosophy itself.

There are many reasons for a turn to meta-theory for international law. First of all, the international legal order is still relatively young, and this makes a discussion of the nature and role of theorizing international law—and of the relationship of that theorizing to practice—particularly important.[60] Secondly, even though the theory of international law has now become a booming field of scholarship, its meta-theory remains largely underdeveloped. Overall, international lawyers have tended to be very pragmatic about the way they conceive of international law.[61] When they are not, they have turned critical. In fact, to date, discussions of the meta-theory of international law have been pursued almost exclusively by critical legal scholars.[62]

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[59] See eg M Giudice and K Culver, *Legality's Borders: An Essay in General Jurisprudence* (OUP Oxford 2010). See also L Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (CUP Cambridge 2014) ch 8 ('What Makes Law Law? Law Beyond the State').

[60] See eg W Twining et al., 'The Role of Academics in the Legal System' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP Oxford 2003) 920–49, at 941.

[61] See ibid 944.

[62] See eg M Koskenniemi, 'International Legal Theory and Doctrine' in *Max Planck Encyclopedia of Public International Law* (OUP Oxford 2011); M Koskenniemi, 'The Methodology of International Law' in *Max Planck Encyclopedia of Public International Law* (OUP Oxford 2011); M Koskenniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice' in Office of Legal Affairs, *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations New York 1999) 495–523.

This has led to their views becoming not only mainstream[63] for lack of contestation, but also over-theorized[64] due to over-concentration.

As a result, and since the mid-twentieth century, positions in the field have become starkly contrasted. One may depict the debate as consisting primarily of a binary opposition between pure theoretical approaches to international law that regard legal scholarship as 'science'[65] and non-theoretical approaches to international law that object to the project of a legal science and criticize any theoretical endeavour as falling either into the trap of apology (politics) or utopia (moralism).[66] Any scholarly project that falls between the two has been quickly disparaged as non-'scientific'[67] and, in some cases, as morally activist by the first group, and as either apologetic or utopian by the second. Of course, there has been a wealth of outsider-theoretical approaches to international law that frame their discussions of international law in a theoretical context other than law. As we have seen in the case of moral philosophy of international law, however, neither of those theories has been particularly interested in the law as law and, most importantly, they have clearly situated themselves outside of international legal theory and hence outside its meta-theory as such.[68]

Normative approaches to international law and international legal theory developed within international law have paid a high price for this state of the meta-theory of international law. Arguably, therefore, the most important reason to develop a meta-theory of international law lies in understanding the specific normativity of international law—the very understanding that is missing in moral philosophies of international law as explained in the previous section. So far, indeed, whereas defenders of a purely legal kind of normativity have endorsed a pure theory of international law,[69] others who do not see or are not interested in the normativity of law (for instance because they see consent, power, rationality, or ideology as the main source of motivation behind international law) have endorsed other disciplines to approach international law such as economics, politics, or international relations.[70]

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[63] See S Singh, 'Appendix 2: International Law as a Technical Discipline: Critical Perspectives on the Narrative Structure of a Theory' in J d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP Oxford 2013) 236–61.

[64] See eg A Rasulov, 'New Approaches to International Law: Images of a Genealogy' in JM Beneyto and D Kennedy (eds), *New Approaches to International Law: The European and the American Experiences* (TMC Asser The Hague 2013) 151–91.

[65] See eg *The Law of the United Nations* (n 11); J Kammerhofer, 'Law-Making by Scholarship? The Dark Side of 21st Century International Law "Methodology"' in J Crawford and S Nouwen (eds), *Select Proceedings of the European Society of International Law* (Hart Oxford 2012) 115–26.

[66] See eg 'Between Commitment and Cynicism' (n 62) 496, 500.

[67] On those debates see A Peters, 'There is Nothing More Practical than a Good Theory: An Overview of Contemporary Approaches to International Law' (2001) 44 *German Yearbook of International Law* 25–37; A Peters, 'Realizing Utopia as a Scholarly Endeavour' (2013) 24 *European Journal of International Law* 533–52.

[68] See 'The Relative Autonomy of International Law or the Forgotten Politics of Interdisciplinarity' (n 13).

[69] See eg 'Law-Making by Scholarship?' (n 65).   [70] See eg sources cited in n 14.

This has forced those few theorists of international law interested in legal reasoning and the moral normativity of law into moral philosophy and to be categorized by others as 'international moralists'.

Interestingly, some of those methodological debates have been reopened lately in a broader fashion. That revival has come mostly from international legal scholars trained in the German[71] or American[72] traditions. Another explanation lies in the (counter-)disciplinary 'call to arms' emitted lately by some critical legal scholars and more 'mainstream' international legal scholars.[73] Realizing the predominance of outsider theories of international law at last (even in the guise of interdisciplinarity) and perhaps also the meta-theoretical sterility of critique for the development of international law, international legal scholars have called for a more methodological involvement of international lawyers. Regrettably, for the time being, those debates tell us very little about what law and its 'discipline' should be, except that it should be cultivated to save international law as a profession.[74] Based on both the practical dimension of law and the normativity of the practice of law, one may argue that theory is central to the practice of international law, and that its very centrality to the practice explains a great deal about the kind of theory it should be: a normative legal philosophy of international law.[75]

3.2 A *Legal* Philosophy of International *Law*

Qua participants in a normative practice, lawyers are enacting and applying norms in a given social-political context. Arguably, therefore, normative legal theorizing is required by the normative practice of law. It helps capture what the concept and nature of law amounts to, that is, its 'legality'. As a normative concept, the law encapsulates one or many values of legality, and normative reasoning is thus a necessary part of its application. Legal theory facilitates that normative reasoning in the practice of law, and enables the law-immanent justification and critique that are characteristic of legal practice *qua* normative practice. So, the relationship

[71] See eg I Feichtner, 'Realizing Utopia through the Practice of International Law' (2012) 23 *European Journal of International Law* 1143–57; 'Realizing Utopia as a Scholarly Endeavour' (n 67).

[72] See eg 'The Role of Academics in the Legal System' (n 60); SR Ratner and A-M Slaughter (eds), *The Methods of International Law* (American Society of International Law Washington DC 2004); G Shaffer and T Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 *American Journal of International Law* 1–46.

[73] See *Formalism and The Sources of International Law* (n 63), by reference to, eg, J Crawford, 'International Law as a Discipline and Profession' (2012) 106 *Proceedings of the American Society of International Law* 471–86; M Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity' (2012) 26 *International Relations* 3–34; J Klabbers, 'Counter-Disciplinarity' (2010) 4 *International Political Sociology* 308–11.

[74] See eg 'International Law as a Discipline and Profession' (n 73) 482.

[75] See also S Besson, 'International Legal Theory *qua* Practice of International Law' in J d'Aspremont et al., (eds), *International Law as a Profession* (CUP Cambridge forthcoming 2016).

between legal theory and practice is not (only or centrally) one of 'science' external to its object. Legal theory is internal to legal practice, which needs it in order to be self-reflective and critical. Normative legal theorizing amounts to theorizing about norms albeit in a contextualized and practical fashion: it takes place in a legal context and is therefore distinct from abstract moral theorizing about the law.

Of course, there is a risk of circularity between the theory and practice of law, as a result. That circularity is virtuous, however. Legal theory helps shape the law, but without the practice there would be nothing to theorize and shape in return. It remains distinct from practice, however, to the extent that theory does not enact and enforce legal norms for lack of (practical) authority to do so. Another risk is that of parochialism. If legal theory is part of the practice of law, then the parochial practice of law may influence the universality of the theory. The enquiry behind legal theory may remain universal, however, despite being part of a (parochial) practice to the extent that its reasoning and conclusions are universally valid across legal cultures (even if the concept of law itself is parochial).[76]

The practical role of legal theory has two normative implications for what is a good legal theory. First of all, legal theory should take the practice of law (and hence of theory) seriously. It should situate itself in the legal practice *qua* self-reflective practice, by being a practice-situated theory that is relevant to the justification and critique that are immanent to the practice. Secondly, legal theory should take the normativity of law (and hence of theory) seriously. It should do more than describe the law, as a result, but also more than merely justify or criticize it in order to reform it. This echoes the opposition between ideal and non-ideal accounts of international law, and Buchanan's argument about the need to bridge them and provide both in the same general theory of international law. What his argument missed, however, was how international law itself and international legal theory offer that self-reflective and generative normative framework for which non-ideal moral philosophers of international law are longing.[77]

These dimensions of normative legal theory illuminate how legal philosophy of international law differs from moral philosophy of international law. On the one hand, international legal theory does not approach international law as a distinct moral object. It is situated in the law, and not outside it. On the other, international legal theory takes the special context of the normativity of law seriously. It does not regard it as another form of global social practice to evaluate, and hence as a morally inert institutional reality. Nor does it underestimate the law's own normative context and ability to develop new norms and its own grounds of legitimacy. This also explains in turn why it would be wrong to argue that taking the (moral) normativity of international law seriously may lead to international moralism[78]

[76] See J Raz, 'Can There Be a Theory of Law?' in MP Golding and WA Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell London 2004) 324–42.

[77] See *Justice, Legitimacy and Self-Determination* (n 4) 57–9.

[78] For this critique, see eg 'Moral Internationalism and the Responsibility to Protect' (n 10).

or equate it with international moral activism.[79] Not only are moral philosophers of international law not necessarily moralists, as argued in the first section, but international legal theorists are not moral philosophers of international law. They may draw from the latter's research and engage with them, but their methods and approaches to international law are distinct.

3.3 The Case in Point: The Philosophy of International Human Rights Law

The current boom in moral philosophies of (international law on) human rights provides an interesting case to illustrate this chapter's point. Based on the reasoning I have presented so far, I would like to argue that international human rights law is a normative practice and that its theory is best developed as a legal theory of that practice.[80] This is something current moral philosophies of international law do not have and, arguably, cannot capture adequately about human rights.

First of all, then, international human rights should be approached as a normative practice. It is indeed a relationship of rights and duties between a right-holder and a duty-bearer. More particularly, it ought to be regarded as a normative legal practice: human rights law holds a central position in human rights practice. As such, international human rights should not be conflated with the moral reality of universal moral rights. Of course, the latter may be theorized separately through moral philosophy or together with international human rights law, depending on one's take on the relationship between international human rights and universal moral rights, but certainly not as a morally constraining blueprint to be merely translated and enforced by legal practice.[81] It is crucial indeed to look at how those moral rights are specified and transformed by the legal practice in return.

Secondly, if this holds, then the theory of the normative practice of international human rights law is best developed *qua* normative legal theory of that practice, and not as moral philosophy. Human rights theory is therefore best conceived as a legal theory of legal (and moral) rights. More specifically, it should start from the hard questions in the legal practice of human rights and make the most of the moral justifications, but also of the critiques articulated within that practice itself.[82] To do so, it can make use of the methodological resources of legal theory and

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[79] For this critique, see eg 'Law-Making by Scholarship?' (n 65).

[80] For a full argument to that extent, see S Besson, 'The Law in Human Rights Theory' (2013) 7 *Zeitschrift für Menschenrechte/Journal for Human Rights* 120–50.

[81] *Contra On Human Rights* (n 23); J Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 *Current Legal Problems* 1–30.

[82] See also S Besson, 'Justifications' in D Moeckli, S Shah, and S Sivakumaran (eds), *International Human Rights Law* (2nd edn OUP Oxford 2014) at 34–52.

then contribute to human rights practice itself.[83] Human rights theory should not therefore be conflated with a moral philosophy of moral rights only according to which legal human rights are a mere translation of moral rights (so-called 'ethical' theories of human rights),[84] nor with a political philosophy of a (non-normative) practice of rights only according to which the practice of legal rights is treated as morally irrelevant or inert (so-called 'political' theories of human rights).[85]

Importantly, the legal practice of human rights should not only be the object of human rights theory, but also the context of human rights theory *qua* legal theory of a normative practice and hence *qua* part of that practice of immanent justification and critique. This is not only a key methodological realization for human rights theory, but also a key meta-theoretical realization for human rights theorists themselves, and for human rights research in general. They should understand themselves as situated in the practice, with the responsibilities that come with it. Thinking and writing for lawyers means writing as a lawyer, and the same applies to international human rights law.[86]

4 CONCLUSION

After explaining how the long absence of normative legal philosophy of international law has been compensated for by resorting to moral philosophizing about international law and what the contributions of those philosophers to international legal scholarship have been, this chapter turned to the more general meta-theoretical question of how best to conduct normative theorizing about international law, and whether and how this may be done within the boundaries of legal philosophy itself.

This chapter argued that the time has finally come for recent developments in the field of the moral philosophy of international law to lead to the development of normative theoretical and meta-theoretical research in international law, thus breaking away from the sterile oppositions between 'realist' and so-called 'moralist' approaches to international law. More specifically, the way we do theory of international law should reflect the normativity of the practice of international law

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[83] See also 'The Law in Human Rights Theory' (n 80).

[84] See eg *On Human Rights* (n 23); 'Towards a Philosophy of Human Rights' (n 81).

[85] See eg *The Law of Peoples* with 'The Idea of Public Reason Revisited' (n 24); *The Idea of Human Rights* (n 23).

[86] *Contra* eg *On Human Rights* (n 23) ch XI. See eg S Besson, *Human Right as Law* (forthcoming 2016, manuscript on file with author).

and be responsive to the pivotal role of normative reasoning in that practice *qua* self-reflective practice. While moral philosophers of international law and especially some of their non-ideal accounts have opened the way, they have stopped short of fully grasping the normativity of law. What we need now is a normative legal philosophy of international law, one that can take international law seriously, at last.